UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
Zaclon, Incorporated,	**)**	**Docket No. RCRA-05-2004-0019**
Zaclon, LLC and	**)**	
Independence Land Development Company,	**)**	
	)	
Respondents	**)**	

ORDER ON CROSS MOTIONS FOR ACCELERATED DECISION AS TO COUNT 2

I. Procedural Background

The Complaint in this matter, filed on September 29, 2004 by Complainant, United States Environmental Protection Agency Region 2, charged Respondent Zaclon Incorporated with violating the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. §§ 6901 *et seq.*, by storing hazardous wastes without a permit. Specifically, the Complaint alleged that Zaclon Incorporated owns and operates a facility at which sash and baghouse dust were stored without a permit or interim status for at least six years prior to an inspection on September 19, 2002, in violation of Section 3005(a) of RCRA, 42 U.S.C. § 6925(a) and the state regulations implementing this provision, Ohio Administrative Code (OAC) 3745-50-45. Respondent filed an Answer to the Complaint on November 2, 2004, denying the alleged violation. After unsuccessfully engaging in Alternative Dispute Resolution, the parties filed their prehearing exchanges as requested by a Prehearing Order.

On August 18, 2005, Complainant moved to amend the Complaint to add Zaclon LLC and Independence Land Development Company as Respondents to the Complaint.[1] A month later, Complainant moved to file a Second Amended Complaint, based on information Complainant received after the Prehearing Exchange from an inspection of Respondents' facility on August 10-12, 2005, adding a second count of violation of RCRA. The second count alleges that Respondents received, stored and treated hazardous waste, namely spent stripping acid, without a permit or interim status, in violation of Section 3005(a) of RCRA and OAC 3745-50-

[1] Zaclon, Incorporated, Zaclon LLC, and Independence Land Development Company are hereinafter collectively referred to as "Respondents" or "Zaclon."

45. By Order dated October 7, 2005, the motions to amend were granted. Complainant filed the Second Amended Complaint on October 14, 2005 (hereinafter referred to as "Complaint"), to which Respondents submitted an Answer on November 2, 2005, *inter alia*, denying the second count of violation.

Complainant filed a Motion for Accelerated Decision on Liability as to Count 1, which was granted on November 3, 2005. On January 9, 2006, Respondents filed a supplement to their Prehearing Exchange for Count 2 of the Complaint, and Complainant filed a Rebuttal Prehearing Exchange as to Count 2 on January 20, 2006.

On February 3, 2006, Respondents filed a Motion for Accelerated Decision as to Count 2 and Memorandum in Support ("Respondents' Motion"), and on the same date, Complainant filed a Motion for Accelerated Decision on Liability on Count Two and Memorandum in Support, which was followed on February 13, 2006 by a Motion for Leave to Submit Corrected Copy of Complainant's Memorandum in Support and attached corrected Memorandum in Support of Accelerated Decision on Count Two. Complainant filed a Response to Respondents' Motion, along with a Memorandum in Support ("EPA's Response") on February 17, 2006. Respondents filed an Opposition to EPA's Motion for Accelerated Decision on February 24, 2006, to which Complainant filed a Reply on March 6, 2006, and Respondents submitted a Surreply on March 15, 2006.

The evidentiary hearing in this matter was scheduled to commence on May 16, 2006, but was postponed to allow for ruling on these and other still pending motions and is now scheduled to commence on June 6, 2006.

II. Laws, Regulations, and Undisputed Facts as to Count 2

Section 3005(a) of RCRA requires EPA to promulgate regulations requiring each person owning or operating a facility for the treatment, storage or disposal (TSD) of hazardous waste to have a permit, and that such a person who has made application for a permit and meets certain other criteria, be treated as having been issued such permit as an "interim status" facility. The term "hazardous waste" is defined as a "solid waste" which, with certain exceptions, exhibits characteristics of ignitability, corrosivity, reactivity or toxicity as defined in 40 C.F.R. § 261.20, or is listed following a rulemaking in 40 C.F.R. §§ 261.3, 261.31-33. The term "solid waste" is defined as any "discarded material" which includes abandoned, recycled or inherently waste-like materials. 40 C.F.R. §§ 261.2(a)(1) and (2). As to recycled materials, the pertinent text of 40 C.F.R. § 261.2(c), provides:

> Materials are solid wastes if they are recycled – or accumulated, stored or treated before recycling - as specified in paragraphs (c)(1) through (4) of this section.
>
> * * * *
>
> (3) *Reclaimed*. Materials noted with "*" in column 3 of Table 1 [of paragraph (c)(4)] are solid wastes when reclaimed (except as provided

> under § 261.4(a)(17)[spent materials other than hazardous wastes listed in Subpart D generated within the primary mineral processing industry from which . . . values are recovered by mineral processing or by beneficiation]).

Table 1 in paragraph (c)(4) in turn shows in the row for "spent materials" a "*" in column 3. Therefore, the regulations show that spent materials that are reclaimed are solid wastes.

The term "spent material" is defined at 40 C.F.R. § 261.1(c)(1) and OAC 3745-51-01(C)(1) as "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing."

A material is "'reclaimed' if it is processed to recover a usable product, or if it is regenerated." 40 C.F.R. § 261.1(c)(4) and OAC 3745-51-01(C)(4). The regulations provide that a material is not a solid waste when it can be shown to be recycled by being "[u]sed or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed." 40 C.F.R. § 261.2(e)(1)(I). The term "treatment" is defined in 40 C.F.R. § 260.10 as "any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste, or so as to recover energy or material resources from the waste, or so as to render such waste non-hazardous, or less hazardous; safer to transport, store, or dispose of; or amenable for recovery, amenable for storage, or reduced in volume." *See also*, Section 1004(34) of RCRA.

The burden of proof as to establishing an exception to the definition of "solid waste" is set out in the regulations at 40 C.F.R. § 261.3(f) states:

> Respondents in actions to enforce regulations implementing Subtitle C of RCRA who raise a claim that a certain material is not a solid waste . . . must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production process) to demonstrate that the material is not a waste, or is exempt from regulation.

Section 3006 of RCRA provides that EPA may authorize states to administer a hazardous waste program in lieu of the federal program. Section 3008 of RCRA authorizes assessment of civil penalties upon the EPA Administrator's determination that a person has violated any requirement of Subtitle C of RCRA, Sections 3001-3023, including Federal regulations promulgated thereunder, or any authorized requirement of a state hazardous waste program. EPA granted the State of Ohio final authorization to administer a hazardous waste program, effective June 30, 1989. 54 Fed. Reg. 27170 (June 28, 1989). EPA authorized Ohio hazardous waste regulations codified at OAC Chapters 3745-49 through 69. *Id.*

Zaclon, which owns and operates a facility in Cleveland, Ohio, manufactures zinc-containing chemicals. Zaclon has been accepting and storing an average of about 272,000 pounds per month of spent stripping acid since the mid-1990s, from at least ten galvanizing facilities. Complaint and Answer ¶¶ 58, 68. The spent stripping acid is initially managed at Zaclon's facility in the "East" and "West" tanks, and is used as an ingredient in manufacturing zinc ammonium chloride. Complaint and Answer ¶¶ 59, 62.

The spent stripping acid has a pH of less than 2. Complaint and Answer ¶ 66. Solid wastes that are aqueous and have a pH less than or equal to 2 exhibit the characteristic of corrosivity and, with certain exceptions not applicable to this case, are hazardous wastes, according to 40 C.F.R. §§ 261.20(a) and 261.22. Zaclon has not been issued a permit, and did not have interim status, to treat, store or dispose of hazardous waste. Complaint and Answer ¶¶ 28, 70, 71.

III. Standards for Accelerated Decision

The Consolidated Rules of Practice provide that –

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a).

Accelerated decision is similar to summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure (FRCP), and therefore case law thereunder is appropriate guidance as to accelerated decision. *CWM Chemical Services, Inc.*, 6 E.A.D. 1, 12 (EAB 1995); *Mayaguez Regional Sewage Treatment Plant* 4 E.A.D. 772, 780-82, (EAB 1993), *aff'd sub nom., Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600, 606 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148.

First it must be determined whether, under FRCP 56(c), the movant has met its initial burden of showing that there exists no genuine issue of material fact, by identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show[ing] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)(quoting FRCP 56(c)). On summary judgment, "neither party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence." *BWX Technologies, Inc.*, 9 E.A.D. 61, 75 (EAB 2000).

For the EPA to prevail on a motion for accelerated decision on liability, it must present "'evidence that is so strong and persuasive that no reasonable [factfinder] is free to disregard it'"

[and] "'must show that it has established the critical elements of [statutory] liability and that [the respondent] has failed to raise a genuine issue of material fact on its affirmative defense . . . .' " *Rogers Corporation v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002)(quoting *BWX*, 9 E.A.D. at 76). "Evidence not too lacking in probative value must be viewed in the light most favorable to the party opposing the motion." *Rogers*, 275 F.3d at 1103. Inferences may be drawn from the evidence if they are "reasonably probable." *Id.* "Summary judgment is inappropriate when contradictory inferences can be drawn from the evidence." *Id.*

The EPA initially must "show that there is an absence of support in the record for the [affirmative] defense." *Id.* If the EPA makes this showing, then the respondent "as the non-movant bearing the ultimate burden of persuasion on its affirmative defense, must meet its countervailing burden of production by identifying 'specific facts' from which a reasonable factfinder could find in its favor by a preponderance of the evidence." *Id.*

On a respondent's motion for accelerated decision upon an affirmative defense, upon which it has the burden of proof, the respondent must present evidence that is so strong and persuasive that no reasonable factfinder is free to disregard it, and that entitles the respondent to judgment in its favor as a matter of law. *BWX*, 9 E.A.D. at 76.

Well settled case law on FRCP 56 states that the non-movant must designate specific facts showing that there is a genuine issue for trial by presenting affidavits, depositions, answers to interrogatories, admissions on file, or other evidence. *Celotex*, 477 U.S. at 324. The motion for summary judgment places the non-movant on notice that all arguments and evidence opposing the motion, including affirmative defenses, must be properly presented and supported. *Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 796 F. Supp. 1164 (S.D. Ind. 1992). To avoid the summary judgment motion being granted, the non-movant must provide "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). It is not sufficient if the nonmoving party's evidence is "merely colorable" or "not significantly probative." *Id.* at 249-250. Summary disposition may not be avoided merely by alleging that a factual dispute may exist, or that future proceedings may turn something up. *Green Thumb Nursery, Inc.*, 6 E.A.D. 782 n. 23 (EAB 1997); *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 543 (9th Cir. 1978). It has been held that an issue of fact may not be raised by merely referring to proposed testimony of witnesses. *King v. National Industries, Inc.*, 512 F.2d 29, 33-34 (6th Cir. 1975)(affidavit saying what the attorney believes or intends to prove at trial is insufficient to comply with the burden placed on a party opposing a motion for summary judgment under FRCP 56); *Ricker v. American Zinser Corp.*, 506 F. Supp. 1, 2 (E.D. Tenn. 1978)(affidavit of counsel containing ultimate facts and conclusions, referring to proposed testimony and stating what the attorney intends to prove at trial, is insufficient to show there is a genuine issue for trial), *aff'd, sub nom. Ricker v. Zinser Testilmaschinen GmbH*, 633 F.2d 218 (6th Cir. 1980).

IV. Arguments of the Parties on Respondents' Motion

Zaclon asserts that there is no genuine issue of material fact as to liability for Count 2 and that it is entitled to judgment as a matter of law as to both liability and penalty for Count 2. Zaclon acknowledges that certain matters are contested by parties, namely, that the Complaint alleges and Zaclon denies that the stripping acid that is the subject of Count 2 is a "spent material" as defined in OAC 3745-51-01(C)(1) [40 C.F.R. § 261.1(c)(1)], and that it is "reclaimed" within the meaning of OAC 3745-51-01(C)(4) [40 C.F.R. § 261.1(c)(4)] by removal of iron and other heavy metals. Complaint and Answer ¶ ¶ 63, 64.

Zaclon asserts that, nevertheless, it is entitled to judgment as a matter of law on the basis that the Ohio Environmental Protection Agency (OEPA) in 1994 found that Respondents' facility does not violate Ohio's Hazardous Waste Regulation by receiving and using stripping acid. Specifically, Zaclon asserts that it engaged in meetings and information exchanges with OEPA, including sending a letter dated August 3, 1994 to Tom Roth of the OEPA, summarizing Zaclon's position on the issue. Respondents' Prehearing Exchange Exhibit (R's Ex.) 14. Subsequently, Zaclon received a letter from Mr. Roth, dated December 23, 1994, stating that the stripping acid Zaclon accepts to produce zinc chloride is not considered a waste and therefore also not a hazardous waste. Complainant's Prehearing Exchange Exhibit (C's Ex.) 20C. Zaclon states that it never received any correspondence from OEPA or EPA contradicting the content of that letter until the Motion to File Second Amended Complaint was filed in September 2005. Zaclon argues that it reasonably relied on Mr. Roth's letter, and that EPA, and apparently OEPA, have provided no basis for the change of interpretation.

Zaclon requests that Count 2 be dismissed pursuant to the fair notice doctrine because the "regulations involved in the instant case are subject to differing interpretations," and for even more reason, because OEPA told Zaclon that its interpretation was correct. Respondents' Motion at 5. Zaclon cites to *Gates & Fox Co., Inc. v. OSHA*, 790 F.2d 154, 156 (D.C. Cir. 1986), holding invalid a sanction for violating an ambiguous regulation where the company did not have fair notice it was violating the regulation, on the basis that the due process clause of the Constitution prevents application of a regulation that fails to give fair warning of the conduct it prohibits or requires.

Zaclon argues further that its reliance on OEPA's communication that Zaclon is in compliance constitutes "any good faith efforts to comply," a factor that must be considered under RCRA § 3008(a)(3) for assessing a penalty. Because Zaclon was led astray by OEPA, no penalty should be assessed, Zaclon argues, citing to *Rollins Environmental Services, Inc. v. EPA*, 937 F.2d 649 (D.C. Cir. 1991). Zaclon asserts that these provisions and principles trump the RCRA Penalty Policy.

In its Response, EPA characterizes Zaclon's argument as one of equitable estoppel and asserts that the Federal government cannot be estopped from enforcing an environmental law even where the respondent relied on an affirmative statement from a state government, citing to *United States v. Marine Shale Processors*, 81 F.3d 1329 (5th Cir. 1996). Moreover, there is no showing of affirmative misconduct by OEPA. Complainant argues that Mr. Roth's letter states that he agrees with Zaclon's interpretation of the regulations, and that Mr. Roth was persuaded to

accede to an erroneous interpretation that Zaclon had been urging for a year after an investigation of Zaclon and inspection on January 5, 1994 upon which Mr. Roth initially believed that the stripping acid was reclaimed and thus constituted hazardous waste. C's Ex. 20A. Complainant points out a memorandum dated June 20, 1994 from OEPA's Central District Office to Mr. Roth and his supervisor stating that Zaclon's process is reclamation and that it should have a permit for storage in its East and West tanks. Complainant points out the lack of evidence of any formal record of the subsequent meetings between Zaclon and OEPA. Complainant asserts that Mr. Roth's December 23rd letter does not offer a very clear explanation of how OEPA analyzed Zaclon's activity or applied the regulations to the facts, and that some materials from the meetings prior to the letter suggest that Zaclon may have misled OEPA on the facts of how the spent stripping acid was processed. The degree to which Respondents' reliance on the interpretation in Mr. Roth's letter was reasonable may be considered as to the penalty, but not as to liability, EPA urges, and points out that it already reduced the penalty by 40 percent for such reliance.

V. Discussion and Conclusion on Respondent's Motion

Zaclon has not cited to any regulatory provision as to which it claims it did not receive fair notice or that is subject to differing interpretations. In any event, assuming that Respondents are challenging the regulatory definitions of "spent material" and/or "reclaimed," the Environmental Appeals Board has stated, "[a]s a general rule, . . . challenges to rulemaking are rarely entertained in an administrative enforcement proceeding . . . This general rule applies even when a party asserts that a rule is unconstitutionally vague." *Norma J. Echevarria and Frank J. Echevarria, d/b/a Echeco Environmental Services*, 1994 EPA App. LEXIS 61, 5 E.A.D. 626, 634 (EAB 1994) (citations omitted). If such challenge were addressed, the standard to be applied is whether the regulation provides a person of ordinary intelligence reasonable notice of what conduct is prohibited or required. *Echevarria*, 5 E.A.D. at 637 (citing *Grayned v. City of Rockford*, 408 U.S. 109 (1972). A challenge may be made either to the regulation on its face, which is generally not addressed in administrative enforcement proceedings, or to the regulation as applied to the facts. "The application of a regulation in a particular situation may be challenged on the ground that it does not give fair warning that the allegedly violative conduct was prohibited." *Phelps Dodge Corp. v. Fed. Mine Safety and Health Review Comm'n*, 681 F.2d 1189, 1192 (9th Cir. 1982). "If the violation of a regulation subjects private parties to . . . civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express." *Diamond Roofing Co., Inc. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). That a regulation is subject to differing interpretations does not render its application a violation of due process. "The question is not whether a regulation is susceptible to only one possible interpretation but rather whether the particular interpretation advanced by the regulator was ascertainable by the regulated community." *Tennessee Valley Authority*, 9 E.A.D. 357, 412 (EAB 2000), *appeal dismissed for lack of jurisdiction*, 336 F. 3d 1236 (11th Cir. 2003), *cert. denied*, 541 U.S. 1030 (2004). An agency has "fairly notified" a regulated party of what conduct is required or prohibited "[i]f, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable

certainty,' the standards with which the agency expects parties to conform." *General Electric Co. v. U.S. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995); *Harpoon Partnership*, TSCA App. No. 04-02, 2005 EPA App. LEXIS 31 (EAB, May 19, 2005)(quoting *Coast Wood Preserving, Inc.*, EPCRA Appeal No. 02-01, slip op. at 29 (EAB, May 6, 2003).

Zaclon has not made any argument under this standard. Moreover, Zaclon has shown that it in fact *did* have notice in 1994 that the stripping acid *may* be regulated as a solid waste, and that it was "ascertainable" that the stripping acid was a solid waste, as shown in the letter from Mr. Krimmel to Mr. Roth, dated August 3, 1994, contesting OEPA's position that the stripping acid is a solid waste, by stating that "we believe that the material should not be considered to be a solid waste." Rs' Ex. 14. S*ee also*, C's Exs. 20A, 20B (OEPA memoranda, dated February 7, 1994 and June 20, 1994, indicating that the stripping acid process meets the definition of "reclamation" of hazardous waste). The regulations very clearly prohibit storage of a spent material that is reclaimed and has a characteristic of a hazardous waste, without permit or interim status. Zaclon argues that its particular material, stripping acid, does not meet the criteria of "spent material," that it "can no longer serve the purpose for which it was produced without processing," or the criteria of being "reclaimed," that it was "processed to recover a usable product." Zaclon argues that the stripping acid was used "as an ingredient . . . in an industrial process to make a product" (zinc ammonium chloride), within the meaning of 40 C.F.R. § 261.1(c)(5). Answer to Complaint ¶¶ 60-62, 64. Zaclon's arguments cannot be construed as claiming that any of the regulatory terms are unconstitutionally vague as applied to its operations, that EPA failed to express something in the regulation, or that Complainant's interpretation of any term was not ascertainable. Instead, Zaclon differs with Complainant on the facts, including the purpose and content of the stripping acid, and the details of its operations.

Assuming that Zaclon intends its arguments to constitute an affirmative defense of equitable estoppel, its argument would be that EPA is estopped from enforcing the Complaint because in 1994, Mr. Roth of OEPA concurred in Zaclon's conclusion that the stripping acid was not a solid waste. The elements of the defense are that it "reasonably relied upon its adversary's actions to its detriment," and that the government "engaged in some affirmative misconduct." *BWX Technologies, Inc.*, 9 E.A.D. at 80 (citing *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995). "When equitable estoppel is asserted against the government, as here, a party bears an especially heavy burden" and "[c]ourts have routinely held that 'mere negligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct sufficient to estop the government.'" *BWX*, 9 E.A.D. at 80 (quoting *Board of County Comm'rs of the County of Adams v. Isaac*, 18 F.3d 1492, 1499 (10th Cir. 1994). "At a minimum, the [government] official must intentionally or recklessly mislead the estoppel claimant." *United States v. Marine Shale Processors*, 81 F.3d at 1350. "The erroneous advice of a government agent does not reach the level of affirmative misconduct." *FDIC v. Hulsey*, 22 F.3d 1472, 1490 (10th Cir. 1994)(citing *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981). A finding of affirmative misconduct may be particularly unlikely when the respondent asserts estoppel against the Federal government based on erroneous advice from an official of a state government. "Allowing state representatives to estop the federal government in this case would provide the states with a mechanism for going below the federal floor of regulation required by RCRA."

Marine Shale Processors, 81 F.3d at 1349.

Complainant has shown an absence of support in the record for a finding of affirmative misconduct, and Respondents have not identified "specific facts from which a reasonable factfinder could find in its favor by a preponderance of the evidence" that affirmative misconduct occurred. Respondents have not pointed to any evidence that Mr. Roth intentionally or recklessly misled Respondents. Accordingly, it is concluded that Respondents have not carried their burden to show that they are entitled to judgment as a matter of law on the basis of equitable estoppel or on the basis of violation of due process by lack of fair notice. The Respondents' Motion for Accelerated Decision and request for dismissal of the Complaint are therefore **denied.**

Respondents' argument that no penalty should be assessed on the basis of their reliance on Mr. Roth's letter will not be considered at this point in the proceeding, but may be considered in the assessment of the penalty, in the context of testimony and evidence presented at the evidentiary hearing.

VI. Motions for Leave to File

Complainant submitted a Motion for Leave to File Corrected Copy of Complainant's Memorandum in Support, which merely added page 4 of the Memorandum that had been omitted from the original Memorandum filed on February 3, 2006. Respondents have not opposed the Motion, and it is therefore **granted.**

Respondent's Surreply included an acknowledgment that surreplies are not authorized by the Consolidated Rules of Practice and a request that it be considered to correct two alleged errors in Complainant's Reply. No opposition was filed by Complainant. The Motion for Leave to File Surreply is **granted.**

VII. Arguments of the Parties on Complainant's Motion

Complainant asserts that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law that Respondents stored and treated spent stripping acid, a hazardous waste, without a permit or interim status. Complainant argues that the spent stripping acid is a "spent material" which is stored, processed and "reclaimed," and thus undergoes "treatment," and is a "solid waste" and a "hazardous waste" as defined in the applicable regulations.

Specifically, Complainant asserts that a galvanizer uses hydrochloric acid to strip the coating off of the metal to be galvanized, by which the hydrochloric acid becomes contaminated by iron, zinc, lead and other substances, and eventually "can no longer serve the purpose for which it was produced without processing," thus meeting the definition of "spent material" in 40

C.F.R. § 261.1(c)(1). After it is used for cleaning the metal, it is contaminated and cannot be used for cleaning anymore, and thus becomes "spent."

Complainant asserts that after storing the spent stripping acid in the East and West storage tanks, Zaclon reclaims zinc chloride by having the stripping acid "processed to recover a usable product,"within the meaning of 40 C.F.R. § 261.1(c)(4) by putting it into tanks where it is chemically treated to remove iron and other heavy metals, and other contaminants such as sulfates and water. Complainant states that Zaclon admitted that the spent stripping acid is contaminated with zinc and iron in the form of zinc chloride, ferrous chloride, zinc sulfate and water, in the Supplement to Respondents' Prehearing Exchange (Rs' Supplement) at 21. Complainant states further that evidence shows that the spent stripping acid is also contaminated with heavy metals including copper, cadmium, and lead, which Zaclon must remove, citing to R's Exs. 17 and 21 through 24 and C's Exs. 18 and 24. Complainant alleges that the spent stripping acid is released from the East and West tanks and flows through a series of pipes and tanks in which it is combined with other chemicals and then treated to remove the impurities.

Complainant acknowledges that the first steps of chemical combination and synthesis in the process of manufacturing zinc ammonium chloride precede the removal of impurities, but asserts that it "appears that the first chemical reactions in the process are essential to the removal of the impurities in the Spent Stripping Acid." EPA's Motion at 17. Complainant points to a letter from Mr. James Krimmel, President of Zaclon, to Werner Niehaus, President of Voigt & Schweizer USA (a galvanizer that sends stripping acid to Respondents), dated June 16, 2005, stating that the stripping acid is often mixed with other zinc chloride solutions and then treated for basicity adjustment and "reaction with oxidizers and sequestering agents to remove heavy metals and iron from the zinc chloride solution." C's Ex. 24. Complainant asserts that the spent stripping acid is first treated in the North and South Iron Tanks, which removes the iron, in which sodium hydroxide (lye) is added to precipitate ferric hydroxide, as explained in the Rs' Supplement at 21. Ammonium hydroxide is added to produce zinc ammonium chloride and other soluble compounds including ferrous chloride and zinc sulfate, sodium chlorate is added to precipitate ferric hydroxide, and barium chloride is added to precipitate barium sulfate. *Id.*

Zaclon claims that the stripping acid is a "co-product" of certain galvanizing plants and is not a "spent material" as defined in OAC 3745-51-01(C)(1) and 40 C.F.R. § 261.1(c)(1). A "co-product" is defined in 40 C.F.R. § 261.1(c)(3) as "produced for the general public's use and is ordinarily used in the form it is produced in the process." Respondents claim that the stripping acid is produced for the general public and is used as an ingredient by Zaclon in the "form it is produced." Respondents point out that the term "general public" is not defined, but that many co-products are sold within the chemical industry but not to the average citizen or consumer. For example, hydrochloric acid is a co-product although not produced for use by the average citizen, and is sold as a product, as is stripping acid.

Zaclon claims that even if it is a "spent material," the stripping acid is not reclaimed but instead is "[u]sed as [an] ingredient[] in an industrial process to make a product" (zinc ammonium chloride) within the meaning of 40 C.F.R. § 261.2(e)(i) and is therefore not a "solid

waste." Distinct components of the material must be recovered as separate end products for the process to be reclamation, Respondents point out. The first chemical reaction, adding ammonium hydroxide to react with zinc chloride and hydrochloric acid, converts stripping acid to zinc ammonium chloride solution, Respondents explain. It does not recover zinc chloride, which would be a distinct component. Therefore, zinc chloride is not reclaimed from the stripping acid. Rather, the first reaction converts the material to zinc ammonium chloride, the target product, so it is no longer stripping acid and is not a waste. Because the conversion to zinc ammonium chloride is completed in the first step of the process, the material was never a waste. Zaclon acknowledges that its normal manufacturing process for galvanizing fluxes includes steps to purify the liquid zinc ammonium chloride prior to crystallization. Subsequent purification steps involve zinc ammonium chloride, not zinc chloride. These purification steps also take place when other raw materials or "virgin materials" are used to produce fluxes. Respondents deny that the process begins with removal of iron and other heavy metals, and deny that sodium hydroxide is added in the manufacturing process. Therefore, Respondents claim the stripping acid is not a hazardous waste and is exempt from permitting requirements, and that there are substantive issues of fact in dispute as to Zaclon's process and whether reclamation occurs, as to which experts at the hearing will testify.

In addition, Zaclon asserts that it did a pre-1994 evaluation of applicable regulations and determined the material is exempt from RCRA, and that this self-determination was validated by OEPA in Mr. Roth's December 23, 1994 letter. Zaclon urges that EPA has a narrow interpretation and the OEPA in 1994 had a broad interpretation of the regulations, and that reasonable persons may conclude that both interpretations are correct, but that the overriding factor should be the impact on the environment and regulatory intent of RCRA's recycling exclusions. Zaclon argues that its use of the stripping acid by recycling is good for the environment and would otherwise be disposed of by galvanizers by deep-well injection.

In its Reply, Complainant argues that Respondents used the term "spent stripping acid" until the Response, in which they refer to the material as "stripping acid." As to the argument of the stripping acid being a co-product, Complainant responds that spent stripping acid is far from any "product" that anyone might buy, there is no evidence that anyone other than Zaclon has bought it, and even Zaclon does not buy it, but requires the galvanizer to pay freight charges. Moreover, it is not "used in the form it is produced by the process" of metal stripping, as a co-product would be used, but instead, chemical reactions are induced to remove the iron. Complainant argues that spent stripping acid is an economic liability to galvanizers because they must pay to store, transport and dispose of it in accordance with applicable hazardous waste regulations, but they avoid these costs by shipping it to Zaclon illegally without hazardous waste manifests, and Zaclon acts as an illegal TSD facility.

Complainant asserts that the regulatory definition of "reclamation" does not include a condition that the processing occur prior to use. Regardless of which step comes first in the process, Zaclon must remove the contaminants, thus reclaim, before it can produce a useful product. Zaclon cannot cure its violation by rearranging the sequence of steps in the process of recovering usable product from hazardous waste. Complainant queries whether use of virgin

materials, not contaminated, would require steps to recover metals and other contaminants. Reply at 14.

Complainant responds to Zaclon's environmentally beneficial argument by asserting that recycling of hazardous wastes is a good thing if done with proper protections and safeguards pursuant to a permit, and refers to leak of 40,000 gallons of hydrochloric acid at Zaclon's facility.

In its Surreply, Respondents contend that they do not use the term "spent stripping acid," as revealed by a word search of previously submitted documents and letters. Respondents also state that Complainant erroneously alleges that the spill of hydrochloric acid on May 30, 2005 was a spill of stripping acid.

VIII. Discussion and Conclusions on Complainant's Motion for Accelerated Decision

A. Whether the stripping acid is a "spent material"

To carry its burden on the motion for accelerated decision as to liability, Complainant must provide strong and persuasive evidence establishing the critical elements of liability. The first question to address is whether Complainant has shown that the stripping acid is a "spent material," as defined in 40 C.F.R. § 261.1(c)(1) - "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing."

Documents in the prehearing exchange show that the stripping acid at issue is hydrochloric acid which was produced for the purpose of cleaning off or "stripping" coatings, including metals, from objects. Voigt & Schweitzer, a galvanizer who is one of Respondents' suppliers, states in a document entitled "Background Information" that it "'strip[s]' (remove[s]) zinc which has accumulated on chains or fixture, by dipping them in the HCL [hydrochloric acid] solution." Rs' Ex. 19.

Documents also show that the stripping acid received by Zaclon has been used for the purpose of stripping objects and as a result of contamination can no longer serve the purpose of "stripping" without processing. Specifically, the hydrochloric acid becomes contaminated with the zinc and/or other metals of which the objects were being "stripped." Voigt & Schweitzer indicates that after the stripping, the resulting zinc chloride solution is "material that could be beneficially re-used," so they have been shipping it to Zaclon since 1994. Rs' Ex. 19. Voigt & Schweitzer explains that prior to 1994, its hydrochloric acid tanks would accumulate iron from pickling (dipping uncoated black material in a solution of hydrochloric acid) as well as zinc from stripping and that iron and zinc chloride "when combined together . . . are not useful, because it is not cost–efficient to separate them when they are 'in solution,'" and that "the mixing of iron and zinc in the HCL solution, prior to 1994, resulted in a product which was necessary to dispose of as waste." Rs' Ex. 19.

Complainant presents a letter dated August 5, 2005, from Henry Stonerook to Ernest

Waterman of EPA Region 1, with attached documents, requesting a determination that zinc chloride from Voigt & Schweitzer is a recycled material and not a hazardous waste; a Regulatory Interpretation, by Marvin Rosenstein, Chief of the Chemical Management Branch, EPA Region 1, dated September 8, 2005 (C's Ex. 26), concluding that the zinc chloride solution Voigt & Schweitzer ships to Zaclon is a hazardous spent material being reclaimed by Zaclon; Voigt & Schweitzer's letter (C's Ex. 28) disagreeing with the Regulatory Interpretation and asserting that its zinc chloride solution is an intended by-product of its pre-treatment process; and a letter, dated December 1, 2005, from Mr. Rosenstein (Rosenstein letter, C's Ex. 29) responding to Voigt & Schweitzer's disagreement. The Rosenstein letter reiterates from the Regulatory Interpretation that Voigt & Schweitzer used a virgin material which became contaminated as a result of the stripping, and then when the stripping tanks need to be recharged due to build-up of zinc chloride and other contaminants, Voigt & Schweitzer is no longer able to use the stripper solution and therefore ships it off-site, to Zaclon, and that it is therefore a "spent material." In response to Voigt & Schweitzer's argument that the zinc chloride solution is a by-product, the Rosenstein letter states that the use of a virgin material which becomes contaminated fits the definition of a spent material and is not a "by-product," which is the catch-all category for materials that are *not* spent materials or sludges. C's Ex. 29.[2]

Complainant has presented documents which are strong and persuasive evidence in support of a finding that the stripping acid is a "spent material."

The next question is whether, drawing all reasonable inferences in favor of Respondents, have they raised any genuine issue of material fact as to whether the stripping acid is a "spent material." In a letter dated August 3, 1994 from Mr. Krimmel to Mr. Roth of OEPA, Mr. Krimmel asserts that the stripping acid "is produced on purpose, by our suppliers, for our use." Rs' Ex. 14. In support, Zaclon presents its Raw Material Specification for zinc chloride solution or "galvanizer's strip acid," requiring testing for iron and zinc chloride and which states that "All material may be accepted, but supplier will be charged additional expenses" and that "material may be rejected if iron levels are >8." Rs' Ex. 17; Rs' Supplement at 15. Otherwise, the material is suitable for use "as is" for an ingredient in manufacturing flux. Rs' Supplement at 15-16. Respondents assert that the galvanizing plant must install equipment to segregate stripping tanks from steel pickling tanks to produce a product that suit Zaclon's needs. *Id*. at 16. Voigt & Schweitzer in its Background Information document states that it designed one tank to

[2] Complainant presents a letter from Mr. Turgeon, CEO of Zaclon, dated January 5, 1993, referring to a "processing fee" Zaclon requests **[CBI deleted]** of stripping acid. C's Ex. 30, attachment. This letter suggests that Zaclon is not "purchasing" a valuable product from the suppliers, but instead is getting paid to relieve them of a waste that no longer is usable for their purposes and that they need to dispose of. However, EPA has rejected a standard of evaluating whether a recycled material is a solid waste based on whether the recycler or the supplier pays for the material. Hazardous Waste Management System, Definition of Solid Waste, 48 Fed. Reg. 14472 (Proposed Rule, April 4, 1983).

be the "stripping" tank and other tanks to be "pickling" tanks, which "would in effect separate the zinc chloride from the iron chloride & result in material that could be beneficially re-used," that zinc chloride has many industrial uses and is most often used in the production of fluxes, and that since 1994 it has been shipping the zinc chloride solution to Zaclon. Rs' Ex. 19. Respondents present a bill of landing showing that the stripping acid is purchased as "zinc chloride solution," and a Material Data Safety Sheet (MSDS) for "zinc chloride solution," or "galvanizer's strip acid" Rs' Ex. 18. Respondents also present the American Galvanizing Association's Sustainable Development Charter, which encourages waste minimization through recycling process chemicals and zinc compounds that result from the galvanizing process. Rs' Ex. 20.

Respondents acknowledge that the purpose for which the material was produced and purchased by galvanizers was as a stripping acid (hydrochloric acid). Rs' Supplement at 18. Respondents contend that in the course of using the stripping acid, the actual chemical composition changes to zinc chloride solution through the chemical reaction of zinc with hydrochloric acid, and is no longer hydrochloric acid. *Id.* Therefore, Zaclon purchases zinc chloride solution, not hydrochloric acid, from galvanizers. Zaclon reasons that it is therefore a co-product and is not a solid waste even though it may also fit the regulatory definition of a spent material.

The substance at issue is the material received by Respondents as "stripping acid." There is no dispute that the "stripping acid" was produced as hydrochloric acid for the purpose of stripping, and that it is been used and thereby becomes contaminated with zinc. The fact that a chemical reaction occurs in the stripping acid, creating zinc chloride, does not mean that an entirely new product has been produced which brings it outside the scope of a spent material. The stripping acid does not become 100 percent zinc chloride, but rather, is a solution consisting of hydrochloric acid, zinc chloride, soluble ferrous chloride, water, and sometimes zinc sulfate (and/or ammonium chloride). Rs' Supplement at 21; Rs' Ex. 18, 25. Thus, it is still stripping acid that has become contaminated, and it has not become pure zinc chloride.

The Regulatory Interpretation and Rosenstein letter show that when Voigt & Schweitzer is no longer able to use the stripping acid solution, it ships the solution to Zaclon. Respondents have not presented any specific facts or evidence to show that the stripping acid could still be used for the purpose of stripping at the time it was removed from the stripping process to be shipped to Zaclon. Respondents have not shown that the galvanizers' installation of equipment to adapt the stripping acid to reduce iron levels and/or other contaminants renders the stripping acid (hydrochloric acid) so uncontaminated that it could still be used for stripping at the point it is removed and shipped to Zaclon.

As to whether the stripping acid is a co-product, EPA has stated in the preamble to the regulations at 40 C.F.R. § 261.1 that a co-product is a "material produced for use by the general public and suitable for end-use essentially as-is . . . that are produced intentionally, and which in their existing state are ordinarily used as commodities in trade by the general public." Hazardous Waste Management System, 50 Fed. Reg. 614, 625 (Final Rule, Jan. 4, 1985).

Zaclon's argument that it cannot think of any material that meets the definition of "co-product" if "general public" means the average citizen or consumer falls flat considering the examples provided in the preamble, namely sulfuric acid, various metals produced in tandem by smelting operations, kerosene, asphalt, or pitch. *Id.* Respondents have not provided any evidence of used stripping acid being "produced for use by the general public" or even that it is of value to other persons or entities. Respondents have not provided any evidentiary support for its argument that it "is not the only company that purchases stripping acid as a raw material." Rs' Supplement at 6. Thus, Zaclon has not shown or raised any genuine issue of material fact suggesting that the stripping acid is "produced for use for the general public" or "ordinarily used as [a] commodit[y] in trade by the general public."

Therefore, it is concluded that Complainant has shown that there is no genuine issue of material fact as to whether the stripping acid is a "spent material," and that Complainant is entitled to judgment as a matter of law that the stripping acid is a "spent material."[3]

B. Whether the stripping acid was "reclaimed"

The regulations state that "Materials are not solid wastes when they can be shown to be recycled by being "Used . . . as ingredients in an industrial process to make a product, *provided the materials are not being reclaimed*." 40 C.F.R. Section 261.2(e)(1)(i)(emphasis added). There is no dispute that the stripping acid was "used . . . as an ingredient in an industrial process to make a product." The question is whether Complainant has established that there are no genuine issues of material fact that a material was "reclaimed," that is, "processed to recover a usable product." 40 C.F.R. Section 261.1(c)(4). Respondents' position is that zinc chloride must first be reclaimed from the stripping acid in order to establish that reclamation has taken place. Complainant's position is that the recovery of zinc chloride values from spent stripping acid is reclamation, regardless of when it occurs in the process, and constitutes treatment of hazardous waste.

A preamble to a regulation is an authoritative Agency interpretation of the regulation, evidence of an Agency's contemporaneous understanding of its proposed rules. *Morton L. Friedman and Schmitt Construction Co.*, CAA App. No. 02-07, 2004 EPA App. LEXIS 3 * 67 (EAB, Feb. 18, 2004). The preamble to the regulations discusses the distinction between "reclamation" and being "used . . as an ingredient . . . in an industrial process to make a product." It states that reclamation involves "situations where material values in a spent material . . . are recovered as an end-product of a process (as in metal recovery from secondary materials)," or where "distinct components of the materials [are] recovered as end-products." 50 Fed. Reg. at 633, 637. The preamble refers to a situation where a secondary material is "first reclaimed and then put to direct use" and states that under the final rule, "spent materials . . . that

[3] As it has been concluded that the stripping acid is a "spent material," it is hereinafter referred to as "spent stripping acid."

are processed to recover usable products . . .-- i.e. that are reclaimed – are solid wastes. If the material is to be put to use after it has been reclaimed, it still is a solid waste until reclamation has been completed. Thus, the fact that wastes may be used after being reclaimed does not affect their status as wastes before and while being reclaimed." *Id.* This situation constitutes the Respondents' narrow interpretation of "reclamation," and which it strenuously distinguishes from the process at its facility. However, it does not appear from the preamble that it is the only situation encompassed by the term "reclamation." The preamble does not preclude from the definition of "reclamation" the situation of spent materials being processed to recover usable products during the manufacture of the product.

The preamble goes on to state that secondary materials used as substitutes for commercial products in particular functions or applications are not solid wastes. 50 Fed. Reg. at 637.

> When secondary materials are directly used . . . they function as raw materials in normal manufacturing operations . . . These direct use recycling situations represent exceptions to the general principle that accumulated hazardous secondary materials are hazardous wastes. . . . The Agency . . . has interpreted its jurisdiction so as to avoid regulating secondary materials recycled in ways that most closely resemble normal production processes. " *Id.* 637-638.

EPA discusses in the preamble some sham situations that provide opportunities for sham recyclers to claim they are using secondary materials. Those situations include where the secondary material is being used in excess of the amount necessary for operating a process, where it is not as effective as what it is replacing, and where it is not handled in a manner consistent with use as a raw material or commercial product substitute, such as where they are "stored or handled in a manner that does not guard against significant economic loss (i.e., the secondary materials are . . . lost through fires or explosions)." 50 Fed. Reg. at 638.

Complainant has submitted several documents in support of its argument that the spent stripping acid was "processed to recover a useful product" and thus reclaimed, bringing it within the definition of a solid waste. Respondents admit that the spent stripping acid is contaminated with ferrous chloride, zinc sulfate and water. Rs' Supplement at 21. Complainant presents documents showing that other contaminants are present in the stripping acid, such as copper, cadmium and lead. C's Ex. 18, 24. In support of its assertion that Respondents must treat the spent stripping acid to remove iron and other heavy metals and materials to reclaim the zinc chloride for use in manufacturing zinc ammonium chloride, first precipitate the ferric hydroxide to eliminate the iron content, and zinc sulfate, if present, Complainant points to, *inter alia*, Respondents' "Flux Manufacturing Flow Chart" (Rs' Ex. 21) and "Description of Flux Manufacturing Process" (Rs' Ex. 22); C's Motion at 11. However, it is not clear from the evidence that stripping acid is "processed to recover a usable product," or that zinc chloride or zinc is a "distinct component" or "material value" which is "recovered *as an end-product* of a process." 50 Fed. Reg. at 633, 637 (emphasis added). The Complainant's motion may be denied on this basis.

Respondents' flow chart and Description of Flux Manufacturing Process exhibits show that upon arrival at Zaclon's facility, the stripping acid is mixed with preflux and zinc chloride from sources other than stripping acid, such as sash. Rs' Ex. 21, 22. This mix goes to the North and South Iron Tanks, where sodium chlorate and ammonium hydroxide and/or zinc oxide create insoluble ferric hydroxide and barium sulfate, when are then filtered out. Rs' Ex. 22. The resulting zinc ammonium chloride solution is then sent to the second stage of removal of impurities. Rs' Ex. 21, 22. Yet, in their "Chemical Reactions" description (Rs. Ex. 23) and Prehearing Statement, Respondents present the initial reaction as starting with zinc chloride solution, adding ammonium hydroxide and producing zinc ammonium chloride, zinc hydroxide, soluble ferrous chloride, zinc sulfate (if present) and water. Then subsequently, sodium chlorate and barium chloride are added to precipitate insoluble ferric hydroxide and barium sulfate, which are then filtered out. Rs' Ex. 23; Rs' Supplement at 21. This description of reactions does not describe all of the reactions taking place in the Iron Tanks. It is unclear at which point zinc ammonium chloride is produced. Moreover, these documents are not dated and there is no indication who authored them.

Respondents have not pointed to any documentation of other persons using stripping acid as an ingredient in a production process. Respondents have not provided "appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production process) to demonstrate that the material is not a waste." 40 C.F.R. § 261.2(f).

It is noted that the parties did not discuss in the motions and responses issues of whether (spent) stripping acid was as effective as purchased zinc chloride solution for manufacturing zinc ammonium chloride, and whether (spent) stripping acid was handled in a manner consistent with use as a raw material, which issues may be important to determining whether the stripping acid was reclaimed.

In summary, there are some discrepancies and gaps in the evidence, and contradictory inferences can be drawn therefrom. It is concluded that there are genuine issues of material fact as to whether the spent stripping acid was reclaimed. Accordingly, Complainant's Motion for accelerated decision as to whether the stripping acid was reclaimed is **denied**.

That issue, in addition to the penalty, if any, to be assessed for Counts 1 and 2 are still in dispute, and are reserved for consideration at the evidentiary hearing.

ORDER

1. Complainant's Motion for Leave to File Corrected Copy of Complainant's Memorandum in Support of its Motion for Accelerated Decision is **GRANTED.**

2. Respondents' Motion for Leave to File Surreply to Complainant's Motion for Accelerated

Decision is **GRANTED.**

3. Respondents' Motion for Accelerated Decision as to Count 2 is **DENIED.**

4. Complainant's Motion for Accelerated Decision on Liability on Count 2 is **GRANTED in part**, as to the issue of whether the stripping acid is a spent material, but **DENIED** as to Respondents' liability.

5. The parties shall continue in good faith to settle this matter. Complainant shall file a status report as to the progress of settlement efforts on **May 26, 2006.**

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Susan L. Biro
Chief Administrative Law Judge

Dated: May 18, 2006
Washington, D.C.